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Sex Trend or Sexual Assault?: The Dangers of “Stealthing” and the Concept of Conditional Consent

Melissa Marie Blanco*

ABSTRACT

“I do not wish [women] to have power over men; but over themselves”
– Mary Wollstonecraft¹

To have power over themselves, women must possess bodily autonomy in the sexual and nonsexual aspects of their life. Unfortunately, however, the nonconsensual removal of a condom during otherwise consensual sex, otherwise referred to as “stealthing,” poses significant dangers to this autonomy. To respond to these dangers, several state lawmakers have proposed legislation to classify stealthing as rape. Feminist scholars, however, warn against over-criminalizing sexual conduct to ensure that the pleasurable experience of consensual sex is not negated.

To strike a balance between the dangers stealthing poses to women and the over-criminalization of sexual conduct, then, legislatures should refrain from creating new laws that classify stealthing as rape. True, current sexual assault laws coupled with inadequate consent laws make prosecuting stealthing difficult. However, if United States courts adopt a new standard of consent, then prosecuting stealthing under existing sexual assault laws will be plausible. During an era of “Me Too” stories roaring around the United States, ensuring that consent standards protect *all* people engaged in sexual conduct is imperative.

This Comment will argue that creating new laws to protect against stealthing, specifically, may threaten the notion of bodily autonomy, and therefore, should be avoided. Ultimately, this Comment will recommend that United States courts should employ a standard of conditional consent

* J.D. Candidate, The Pennsylvania State University, Penn State Law, 2019. Thank you so much to J.D. Moore, Nicholas Taylor, Kazi Ahmed, and Dean Dara Purvis for your diligent help and your commitment to helping me be as successful a writer as possible. You are all very much appreciated.

1. MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN 107 (Scribner & Wolford 1890) (1792).

because this standard achieves equilibrium between the conflicting propositions of the need to preserve a woman's bodily autonomy and the dangers of over-criminalizing sexual conduct.

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I. INTRODUCTION

In early 2018, Aly Raisman² declared, "My dream is that one day, everyone will know what the words, 'Me too,' signify, but they will be educated and able to protect themselves from predators . . . , so they will never ever ever have to say the words, 'Me too.'"³ Many organizations in

2. Aly Raisman is a United States gymnast who spoke out about the sexual abuse she encountered at the hands of United States Gymnastics national team doctor, Larry Nassar. See Jake Tapper & Kim Berryman, *Raisman says she was threatened, ignored over abuse claims*, CNN, <https://www.cnn.com/2018/02/09/politics/aly-raisman-abuse-allegations/index.html> (last updated Feb. 9, 2018).

3. Aly Raisman, *Full Text of Aly Raisman's Statement*, N.Y. TIMES (Jan. 20, 2018), <https://nyti.ms/2PJDM4r>.

the United States share Raisman's dream—that survivors of sexual assault and sexual harassment will have the tools necessary to protect themselves from perpetrators.⁴ Sexual violence in the United States, however, remains a common, horrific, reality for women.⁵ One scholar even noted that commonplace harassment “both evokes and reinforces women's legitimate fear of rape . . . by reminding women that they are vulnerable to attack and by demonstrating that any man may choose to invade a woman's personal space, physically or psychologically, if he feels like it.”⁶ Fortunately, the ingrained fear of rape instilled in many women is an issue that scholars like Alexandra Brodsky⁷ are combating through their work.⁸

In early 2017, Alexandra Brodsky conducted a study during which she identified an online community where nonconsensually removing a condom during otherwise consensual sex was dubbed “stealthing.”⁹ Brodsky's research led her to what is referred to as the “manosphere,”¹⁰ which is “a group of loosely associated websites, blogs, and forums all concerned with masculinity and men's issues.”¹¹ Notably, the manosphere includes commentary by Men's Rights Movement¹² activists.¹³ In the

4. See, e.g., *Legal Assistance*, SURVJUSTICE, <http://www.survjustice.org/legal.html> (last visited Aug. 27, 2018) (“SurvJustice is a national not-for-profit organization that increases the prospect of justice for all survivors through effective legal assistance that holds both perpetrators and enablers of sexual violence accountable in campus, criminal and civil systems.”); *About RAINN*, RAINN, <https://www.rainn.org/about-rainn> (last visited Aug. 27, 2018) (describing the organization's focus on preventing sexual violence, helping survivors, and ensuring that perpetrators are held accountable for their actions); *About Us*, THE NAT'L CTR. FOR VICTIMS OF CRIME, <http://victimsofcrime.org/about-us> (last visited Aug. 27, 2018) (“The mission of the National Center for Victims of Crime is to forge a national commitment to help victims of crime rebuild their lives.”).

5. CYNTHIA G. BOWMAN ET AL., *FEMINIST JURISPRUDENCE: CASES AND MATERIALS* 214 (Jesse H. Choper et al. eds., 4th ed. 2011). This statement, however, is not to be misconstrued to suggest that men are never victims of sexual assault. The statement merely echoes the findings of the United Nations Secretary-General's study on violence against women, which reported that, “violence against women is a severe and pervasive human rights violation throughout the world . . .” U.N. Secretary-General, *In-Depth Study on All Forms of Violence Against Women*, ¶ 255, U.N. Doc. A/61/122/Add.1 (July 6, 2006).

6. Cynthia G. Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 540 (1993).

7. Alexandra Brodsky is a Skadden Fellow at the National Women's Law Center in Washington, D.C. See *Staff: Alexandra Brodsky, Fellow*, NATIONAL WOMEN'S LAW CENTER, <https://nwlcl.org/staff/alexandra-brodsky-fellow/> (last visited September 23, 2018).

8. See *infra* Section II.A.

9. See Alexandra Brodsky, “Rape Adjacent”: *Imagining Legal Responses to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L. 183, 184 (2017).

10. See *infra* Section II.A.

11. CHRISTA HODAPP, *MEN'S RIGHTS, GENDER, AND SOCIAL MEDIA*, at xv (2017).

12. See *infra* Section II.A.

13. See HODAPP, *supra* note 11, at xv.

manosphere, Brodsky discovered that men had been sharing personal stealthing experiences, in which the men bragged about removing their condoms during sex without informing their partners.¹⁴ Brodsky's research study induced a new discussion: Does the United States have laws in place to protect victims of stealthing?¹⁵ This Comment will argue that the answer is "yes."

Part II of this Comment will present a discussion of the Men's Rights Movement and its ties to stealthing, the dangers of stealthing, and the importance of the sex-positive movement.¹⁶ Part II will also present California and Pennsylvania's existing sexual assault statutes, as well as the Model Penal Code's newly revised sexual assault statute.¹⁷ Discussing these statutes will make the inadequacy of the United States' current sexual assault and rape legislation strikingly evident.¹⁸ Part II will conclude with a discussion of the evidentiary requirements in sexual assault cases, and will demonstrate why stealthing should be prosecuted under existing sexual assault laws rather than under existing or newly created rape laws.¹⁹

Next, Part III will introduce the concept of conditional consent, a standard utilized by courts in the United Kingdom.²⁰ Specifically, Part III will analyze *Assange v. Swedish Prosecution Authority*,²¹ a United Kingdom case in which conditional consent was applied.²² Part III will also compare the United Kingdom's conditional consent standard with California's affirmative consent law, explain how conditional consent satisfies due process requirements of the Due Process Clause of the United States Constitution,²³ and explain why the United States' criminal laws need a more comprehensive standard of consent than what presently exists.²⁴ Ultimately, Part III will recommend that United States courts should employ a conditional consent standard to prosecute stealthing under existing sexual assault statutes.²⁵ Finally, Part IV offers concluding statements on the issues raised by the Comment.²⁶

14. Brodsky, *supra* note 9, at 184.

15. See *infra* note 63 and accompanying text.

16. See *infra* Sections II.A–C.

17. See *infra* Section II.D.

18. See *infra* Sections III.A.2, III.B.

19. See *infra* Sections II.E–F.

20. See *infra* Section III.A.

21. *Assange v. Swedish Prosecution Auth.* [2011] EWHC 2849 (Admin) (Eng.).

22. See *infra* Section III.A.1.

23. U.S. CONST. amend. XIV, § 1.

24. See *infra* Sections III.A.2–4.

25. See *infra* Section III.B.

26. See *infra* Part IV.

II. BACKGROUND

While stealthing was given an official name only within the last few years, the practice has been going on for several years in the gay community.²⁷ Nevertheless, stealthing has gained traction in the heterosexual community, in large part through online discussion boards relating to the Men's Rights Movement.²⁸

A. *The Men's Rights Movement and Stealthing*

The inception of the Men's Rights Movement ("MRM") is largely unknown, its members claim, due to censorship.²⁹ The MRM's "modern movement . . . emerged as feminism entered its second wave in the 1970s."³⁰ The fundamental goal of the MRM, though, has remained unchanged throughout the years: "reclaim masculinity, and reassign the lost value to traditional male values."³¹ Many men's rights activists ("MRAs") continue to believe that the rise of women³² has defeated many opportunities previously available more exclusively to men, which has led

27. See Vonny Leclerc, *Vonny Moyes: Let's Not Kid Ourselves That 'Stealthing' Is a Trend. It Is Rape*, THE NATIONAL (Apr. 30, 2017), <http://bit.ly/VonnyMoyes> (explaining that stealthing has impacted the gay community for years and that the behavior is not as new as the media depicts it to be); see also Amanda Weiss, Comment, *Criminalizing Consensual Transmission of HIV*, 2006 U. CHI. LEGAL F. 389, 389 (2006) (defining "gift-giving" as a process by which HIV-positive men willingly infect an HIV-negative partner).

28. See Leclerc, *supra* note 27 ("The practice has now made its way into the heterosexual community via the 'manosphere,' where Men's Rights Activists and Men Going Their Own Way followers see sexual entitlement to women as their right, and stealthing as a means of gratification and punishment.").

29. See PETER WRIGHT, *Introduction to A BRIEF HISTORY OF THE MEN'S RIGHTS MOVEMENT: FROM 1856 TO THE PRESENT* (2017) (claiming that the inception of the MRM has been censored). The book states:

The longevity of the [Men's Rights Movement] has been largely overlooked due to successful efforts to censor its existence. Such censorship is not new, being also described more than 100 years ago by men's rights advocate Ernest B. Bax who wrote about efforts to block the circulation of his pamphlet on the legal disadvantages and discrimination suffered by men.

Id.

30. Lauren Strapagiel, *Men's Rights Movement Sees Resurgence Among Millennial Males*, HUFFINGTON POST (Apr. 15, 2013, 6:51 AM), <http://bit.ly/MRMResurgence>.

31. See HODAPP, *supra* note 11, at viii; see also Strapagiel, *supra* note 30 (discussing that the MRM "is a backlash against the loss of traditional privilege").

32. The rise of women includes, but is not limited to, the number of women attaining higher education, which, as of July 2014, was only slightly higher than the number of men. See *FFF: Women's History Month: March 2016*, U.S. CENSUS BUREAU (Feb. 10, 2016), <https://www.census.gov/newsroom/facts-for-features/2016/cb16-ff03.html>. For more discussion on "the rise of women," see generally HANNA ROSIN, *THE END OF MEN: AND THE RISE OF WOMEN* (2012).

to both a higher number of male collegiate drop-outs and higher rates of depression and suicide among men.³³

MRAs' disapproval of the feminist movement has manifested itself in the creation of the "manosphere," where MRAs take to the Internet to discuss men's issues and masculinity.³⁴ Because MRAs "reject the possibility of engaging constructively with the current 'gynocentric' culture, and thus refuse to work within the mainstream society,"³⁵ the so-called "manosphere" has created a forum for MRAs to discuss ways to meet the goals of the MRM.³⁶ The philosophy of the manosphere can be simplified into two core principles: "(1) feminism has overrun/corrupted modern culture, in violation of nature/biology/inherent gender differences, and (2) men can best seduce women ([or] save society in general) by embracing a super dominant, uber masculine gender role, forcing ladies to fall into step behind them."³⁷

Simply put, the "manosphere" perpetuates the idea that "sexual entitlement to women [is a] right."³⁸ This notion of sexual entitlement is represented in the form of stealthing, where a man and his partner agree to engage in protected sex, and the man removes his condom without his partner's consent.³⁹ According to Brodsky's study, men who stealth "support an ideology of male supremacy in which violence is a man's natural right."⁴⁰ For MRAs, specifically, stealthing is "a means for gratification and punishment."⁴¹ The bedrock of stealthing, therefore, appears to be the socialized masculine dominance preached and practiced by MRAs looking to fulfill the goals of the MRM.⁴²

33. See Strapagiel, *supra* note 30.

34. See HODAPP, *supra* note 11, at xv; see also Leclerc, *supra* note 27. See generally Michael A. Messner, *The Limits of the "Male Sex Role": An Analysis of the Men's Liberation and Men's Rights Movement's Discourse*, 12 GENDER & SOC'Y 255 (1998) (discussing the Men's Rights Movement as an anti-feminist backlash).

35. HODAPP, *supra* note 11, at viii.

36. *Id.* at ix (stating that the "generalized goal is not to engage with the culture at large, but to disrupt or destroy it all together"). But see Robert Brockway, *An Introduction to the Men's Rights Movement* (Mar. 21, 2015), <https://www.avoiceformen.com/mens-rights/an-introduction-to-the-mens-rights-movement/> (arguing that MRAs are "not advocating for a return to the gender roles seen in the past," and that MRAs "want everyone to have a fair playing field on which they live their lives free from traditional gendered obligations").

37. HODAPP, *supra* note 11, at xv (internal citation omitted).

38. Leclerc, *supra* note 27.

39. See Brodsky, *supra* note 9, at 184.

40. *Id.*

41. Leclerc, *supra* note 27.

42. See *id.*

B. The Dangers of Stealthing

Stealthing, like other forms of sexual assault, is dangerous because victims⁴³ may suffer potential physical and psychological harm.⁴⁴ Physical dangers of unprotected sex include, but are not limited to, unwanted pregnancy, sexually transmitted infections or diseases, and HIV/AIDs.⁴⁵ Equally troubling are the psychological dangers that stealthing victims might face, including “feelings of shame, violation, [and] loss of dignity and autonomy,” which are feelings similarly reported by rape victims.⁴⁶ The harms that result from both stealthing and rape likely mirror each other because each violation negates the victim’s autonomy.⁴⁷ Sexual assault is considered an unwanted experience forced on someone without consent.⁴⁸ Stealthing is conceptually similar, particularly because the victim has now been exposed to physical dangers from which she took measures to protect herself; as a result, stealthing and rape survivors may face similarly dangerous consequences.⁴⁹

In 1974, psychologists Ann Burgess and Lynda Holmstrom conducted a year-long study to identify the psychological harms that typically manifest in sexual assault victims.⁵⁰ The study revealed that “rape victims experience more depression, anxiety, fear and social adjustment and sexual problems than woman who have not been victimized.”⁵¹ The study also found that rape victims may experience post-traumatic stress disorder.⁵² The study additionally noted that while some women may not show any symptoms following a rape or a sexual assault, other women may “continue to exhibit symptoms that can persist for

43. Throughout this Comment, the terms “victim” and “survivor” are used interchangeably. To read more about the limiting function of these terms, *see* Brodsky, *supra* note 9, at 184 n.3.

44. *See* Nishita Gupta, *Stealthing, or a Partner Taking Off the Condom During Sex Without Consent, Is a New Sex ‘Trend’*, VAGABOMB (Apr. 25, 2017), <http://bit.ly/DangerousSexTrend> (“Victims of stealthing face similar consequences as that of rape, including . . . increased risk of pregnancy and exposure to sexually-transmitted infections.”).

45. *See* Brodsky, *supra* note 9, at 186; *see also id.*

46. *See* Gupta, *supra* note 44; *see also* Brodsky, *supra* note 9, at 186.

47. *See infra* Section II.D.

48. *See infra* Section II.F.

49. *See* Gupta, *supra* note 44.

50. BOWMAN ET AL., *supra* note 5, at 323.

51. Patricia A. Frazier & Eugene Borgida, *Rape Trauma Syndrome: A Review of Case Law and Psychological Research*, 16 L. & HUM. BEHAV. 293, 301 (1992).

52. *Id.*

decades, and throughout [their] lifetime.”⁵³ The symptoms identified in the study came to be known as Rape Trauma Syndrome.⁵⁴

Although the reliability of Rape Trauma Syndrome is sometimes criticized,⁵⁵ “[t]he National Institute of Mental Health has recognized that ‘violence poses a particular threat for women and significantly contributes to serious negative mental health consequences.’”⁵⁶ Indeed, stealthing and rape are distinct assaults to a woman’s bodily and sexual autonomy; the dangerous consequences that result from these assaults, however, are strikingly similar and can affect victims in the short- and long-term.⁵⁷

C. *Why Should We Talk About Stealthing?*

Discussing stealthing not only ensures that victims are knowledgeable about the resources available to them for recovery but also underscores the prominence of rape culture.⁵⁸ Before Brodsky’s article, many women did not know they were survivors of sexual assault.⁵⁹ Once “nonconsensual condom removal” was given a name, however, victims came forward to tell their stories.⁶⁰ Now, addressing what types of resources are available is important in helping victims in their recovery

53. Kathryn M. Davis, *Rape, Resurrection, and the Quest for Truth: The Law and Science of Rape Trauma Syndrome in Constitutional Balance with the Rights of the Accused*, 49 HASTINGS L.J. 1511, 1516–20 (1998).

54. *See id.* at 1518.

55. *See* BOWMAN ET AL., *supra* note 5, at 323 (suggesting that there are concerns regarding the reliability of the Rape Trauma Syndrome study conducted by psychologists Burgess and Holmstrom).

56. *Id.* at 322 (citing WOMEN’S MENTAL HEALTH: AGENDA FOR RESEARCH 11 (Anita Eichler & Delores L. Parron eds., 1987)).

57. *See supra* note 44 and accompanying text.

58. “Rape culture” is popularly defined as:

[A] complex of beliefs that encourages male sexual aggression and supports violence against women. It is a society where violence is seen as sexy and sexuality as violent. In a rape culture, women perceive a continuum of threatened violence that ranges from sexual remarks to sexual touching to rape itself. A rape culture condones physical and emotional terrorism against women as the norm. In a rape culture both men and women assume that sexual violence is a fact of life, inevitable as death or taxes. This violence, however, is neither biologically nor divinely ordained.

Elizabeth Johnston, “*Let Them Know That Men Did This*”: *Medusa, Rape, and Female Rivalry in Contemporary Film and Women’s Writing*, in BAD GIRLS AND TRANSGRESSIVE WOMEN IN POPULAR TELEVISION, FICTION, AND FILM 183, 185 (Julie A. Chappell & Mallory Young eds., 2017) (citing EMILIE BUCHWALD ET AL., TRANSFORMING A RAPE CULTURE (Milkweed rev. ed. 2005) (1993)).

59. *See* Brodsky, *supra* note 9, at 183.

60. *See id.*

process. Equally important is ensuring that rape culture is destroyed and that discussion about rape does not, once again, become taboo.

1. Victim Recovery

Remarkably, “[u]ntil the impact of [rape] was more fully understood and appreciated, rape was a misinterpreted crime that was too often not taken seriously enough by professionals and the significant others in the victims’ lives.”⁶¹ This misrepresentation “affected . . . the availability of appropriate forms of treatment for victims.”⁶² Similarly, if stealthing is not taken seriously by professionals and lawmakers,⁶³ victims will be unable to receive the treatment needed to circumvent the long-term psychological dangers associated with the assault.⁶⁴

Because “stealthing” is a relatively new term, determining how many people have been affected by this assault is a difficult, if not impossible, task.⁶⁵ However, one article notes that “it’s been . . . troubling[] to see how many women have come forward with a ‘me too’ story” once a stealthing experience is proclaimed to the public.⁶⁶ Thus, even with the number of women coming forward with stories of stealthing experiences, there is likely an even greater number of women who harbor their stories.

Even more troubling is that many women recounting a stealthing experience preface their stories with: “I’m not sure this is rape, but . . .”⁶⁷ Indeed, a recent stealthing survey found that many victims “felt deceived, but they did not think of contacting authorities about the incident because they did not think stealthing, however despicable, technically violated any laws.”⁶⁸ The misrepresentation of rape had a deterrent effect on the availability of appropriate treatment for victims, and, unless stealthing

61. Patricia A. Resick, *The Psychological Impact of Rape*, in UNDERSTANDING VICTIMOLOGY: SELECTED READINGS 97, 97 (Peggy M. Tobolowsky ed., 2000).

62. *Id.*

63. Notably, two members of Congress have already taken steps to give professionals a better understanding of stealthing, and to discuss the legal actions stealthing victims are currently able to take, which highlights the importance in taking stealthing seriously. See Letter from Reps. Ro Khanna & Carolyn B. Maloney to Rep. Bob Goodlatte, Chairman, H. Judiciary Comm. & Rep. John Conyers, Ranking Member, H. Judiciary Comm. (Oct. 4, 2017), <http://bit.ly/2CaAW5H> [hereinafter Khanna & Maloney Letter].

64. See *supra* Section II.B for a discussion about the long-term psychological dangers associated with stealthing.

65. See Brodsky, *supra* note 9, at 183 (noting that the victims she interviewed were unsure whether stealthing is rape).

66. Leclerc, *supra* note 27.

67. See Brodsky, *supra* note 9, at 183.

68. Gupta, *supra* note 44.

cases are given proper attention, stealthing victims will suffer from a similar effect.

2. Sex-Positive Feminism and Bodily Autonomy

In the late 1980s, the sex-positive feminism movement began.⁶⁹ The movement developed as a response to Catharine MacKinnon's feminist campaign against pornography.⁷⁰ The sex-positive movement "centers on the idea that sexual freedom is an essential component of women's freedom."⁷¹ More broadly, sex-positivity is the "belief that consensual sexual expression is both healthy and important."⁷² In other words, the sex-positive movement emphasizes the right to bodily autonomy.⁷³ The movement is important because it focuses largely on dismantling a rape-supportive culture.⁷⁴ Therefore, in order for the sex-positive movement to continue dismantling rape culture, bodily autonomy must be preserved and respected.⁷⁵

Bodily autonomy is defined as "the right to self-governance over one's body without external influence or coercion."⁷⁶ Further, stealthing is defined as the nonconsensual removal of a condom during otherwise

69. BOWMAN ET AL., *supra* note 5, at 177.

70. *Id.* at 187. Catharine MacKinnon is a law professor at the University of Michigan Law School and Harvard Law School. See *Faculty Biographies: Catherine A. MacKinnon*, U. MICH., MICH. LAW, <https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=camtwo> (last visited Sept. 23, 2018). Professor MacKinnon was instrumental in pioneering the legal claim for sexual harassment. See *id.* Presently, she specializes in sex equality issues under domestic and international law. See *id.* To read one of Professor MacKinnon's most recent works on the cultural transformation on sexual equality, see CATHARINE MACKINNON, *BUTTERFLY POLITICS* (2017).

71. NEERU TANDON, *FEMINISM: A PARADIGM SHIFT* 67 (2008); see also BOWMAN ET AL., *supra* note 5, at 187 ("Among other things, [third-wave feminists] recognize the multifaceted nature of sex work and argue that women 'should take charge of their own sexual satisfaction.'"); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 206 (2001) (explaining how legal feminists "have done a more than adequate job of theorizing circumstances in which 'no' is the right answer to a sexual encounter, but where are [they] on the conditions under which [women] would be inclined to say 'yes'?").

72. *Sex-Positivity: Educate, Empower, Self-Define!*, FEMINISTCAMPUS, <http://feministcampus.org/campaigns/sex-positivity/> (last visited Sept. 2, 2018).

73. See *id.*

74. See *Sex Positivity*, NW. UNIV., <http://www.northwestern.edu/care/about-us/philosophy/assets/sex-positive-definition.pdf> (last visited Sept. 2, 2018) [hereinafter NW. UNIV., *Sex Positivity*].

75. See *Sex-Positivity: Educate, Empower, Self-Define!*, *supra* note 72. See generally Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 L. & PHIL. 35 (1992).

76. *Bodily Autonomy*, SEXINFOONLINE, <http://www.soc.ucsb.edu/sexinfo/article/bodily-autonomy> (last visited Sept. 2, 2018).

consensual sex.⁷⁷ Therefore, stealthing necessarily violates a person's bodily autonomy.

Additionally, because stealthing perpetuates the idea that men must be sexually assertive to affirm their masculinity,⁷⁸ and because stealthers state that the act is often used as punishment for women who choose to be "promiscuous,"⁷⁹ stealthing challenges the concepts emphasized by the sex-positive movement. This threat is particularly important because rape been an historically taboo subject.⁸⁰ Sex-positivity stresses open and honest communication regarding consensual sex.⁸¹ Therefore, openly discussing stealthing is necessary to ensure that sexual assault laws are amended to adequately address stealthing, and that subjects such as rape and sexual assault do not once again become taboo.

Moreover, consent throughout sexual activity is pivotal to the sex-positive movement,⁸² which aims "to remove the stigma and shame from all sexual choices."⁸³ However, because stealthing is defined as the *nonconsensual* removal of a condom, and because victims report feeling guilty or shameful,⁸⁴ stealthing poses a significant danger to the sex-positive movement's concepts, which play an important role in the de-stigmatization of rape and other forms of sexual violence.⁸⁵

D. Current Laws Protecting Victims of Stealthing and Holding Perpetrators Accountable

Currently, no state laws explicitly make stealthing illegal.⁸⁶ Although all states make sexual assault illegal, some states differentiate between

77. See Brodsky, *supra* note 9, at 184.

78. See *supra* Section II.A.

79. See Leclerc, *supra* note 27 (explaining that men who, without their partner's consent, remove their condom during intercourse do it as a "means of gratification and punishment").

80. See Christopher A. Medjesky, *How Can Rape Be Funny?: Comic Persona, Irony, and the Limits of Rape Jokes*, in *STANDING UP, SPEAKING OUT: STAND-UP COMEDY AND THE RHETORIC OF SOCIAL CHANGE* 195, 198 (Matthew R. Meier & Casey R. Schmitt eds., 2016) (implying that rape, as a subject of conversation, traditionally has been taboo).

81. NW. UNIV., *Sex Positivity*, *supra* note 74.

82. See *Sex-Positivity: Educate, Empower, Self-Define!*, *supra* note 72.

83. *Sex Positivity*, COLO. STATE UNIV. WOMEN & GENDER ADVOCACY CTR., <http://www.wgac.colostate.edu/sex-positivity> (last visited Oct. 14, 2017).

84. See Gupta, *supra* note 44 ("Victims of stealthing face similar consequences as that of rape, including feelings of shame . . .").

85. See *Sex-Positivity: Educate, Empower, Self-Define!*, *supra* note 72 ("Sex-positivity fights rape culture by emphasizing consent, valuing bodily autonomy, and empowering young people to make informed decisions.").

86. See Brodsky, *supra* note 9, at 183 (explaining that stealthing victims "do not know what to call the harm and the United States courts have not had occasion to address and

sexual assault and rape by using phrases such as “sexual contact” and “sexual intercourse.”⁸⁷ Because this Comment will argue that stealthing should be prosecuted under existing sexual assault statutes rather than existing or newly-created rape statutes, this section will only discuss sexual assault statutes. Furthermore, while sexual assault statutes vary from state to state, all sexual assault statutes turn on whether there was consent for the sexual activity at issue.⁸⁸ Like sexual assault statutes, definitions of consent vary from state to state.⁸⁹

1. California

California’s consent law is popularly referred to as “affirmative consent.”⁹⁰ Affirmative consent exists when both partners explicitly indicate, either with words or actions, that they agree to continue with the sexual activity that is currently occurring.⁹¹ Some college campuses utilize an affirmative consent standard to define consent in the college’s conduct

name” the conduct). However, two United States representatives are working to change that. *See* Khanna & Maloney Letter, *supra* note 63.

87. *Compare* MONT. CODE ANN. § 45-5-502 (West, Westlaw through 2017 Legis. Sess.) (“A person who knowingly subjects another person to any sexual contact without consent commits the offense of sexual assault.”), *and* GA. CODE ANN. § 16-6-22.1 (West, Westlaw through 2018 Legis. Sess.) (“A person commits the offense of sexual battery when he or she intentionally makes physical contact with the intimate parts of the body of another person without the consent of that person.”), *with* MONT. CODE ANN. § 45-5-503 (West, Westlaw through 2017 Legis. Sess.) (“A person who knowingly has sexual intercourse with another person without consent . . . commits the offense of sexual intercourse without consent.”), *and* GA. CODE ANN. § 16-6-1 (West, Westlaw through 2018 Legis. Sess.) (“A person commits the offense of rape when he has carnal knowledge of: (1) A female forcibly and against her will . . . Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ.”). *See* ELIZABETH BOSKEY ET AL., THE TRUTH ABOUT RAPE 4-5 (Robert N. Golden & Fred L. Peterson eds., 2d ed. 2010) (explaining that “[s]exual assault occurs when someone threatens or forces someone to have sexual contact against his or her will”); *see also* *Sexual Assault*, RAINN, <https://www.rainn.org/articles/sexual-assault> (last visited Sept. 2, 2018) (“Rape is a form of sexual assault, but not all sexual assault is rape. The term rape is often used as a legal definition to specifically include sexual penetration without consent.”).

88. *See Legal Role of Consent*, RAINN, <https://www.rainn.org/articles/legal-role-consent> (last visited Sept. 2, 2018) (explaining that terms like rape, sexual assault, and sexual abuse are defined differently from state to state, but “no matter which term you use, consent often plays an important role in determining whether an act is legally considered a crime”).

89. *Id.* (“There is no single legal definition of consent.”).

90. *See* CAL. PENAL CODE § 261.6 (West, Westlaw through Ch. 228 of 2018 Legis. Sess.) (“[C]onsent’ shall be defined to mean positive cooperation in act or attitude pursuant to the exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.”).

91. *See id.*

policies.⁹² Additionally, a few states use affirmative conduct to statutorily define consent.⁹³

Under California's consent law, survivors of stealthing would seemingly have a basis to bring charges against their assaulter.⁹⁴ Whether stealthing violates affirmative consent cannot be determined with certainty, however, because a California court has not had occasion to consider the issue.⁹⁵

2. Model Penal Code

A second example of a consent law is the Model Penal Code's⁹⁶ (MPC) definition of consent. In 2016, the American Law Institute amended the MPC's definition of consent to state:

'Consent:'

- (a) 'Consent' for purposes of Article 213 means a person's willingness to engage in a specific act of sexual penetration or sexual contact.
- (b) Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.
- (c) Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context

92. The University of Minnesota, University of California, and Yale University all have affirmative consent policies. See *"Yes Means Yes" & Affirmative Consent*, END RAPE ON CAMPUS, <http://endrapeoncampus.org/yes-means-yes/> (last visited Sept. 2, 2018).

93. See WIS. STAT. ANN. § 940.225(4) (West, Westlaw through 2017 Act 367) ("'Consent' . . . means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact."); see also WASH. REV. CODE ANN. § 9A.44.010(7) (West, Westlaw through 2018 Legis. Sess.) ("'Consent' means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.").

94. See CAL. PENAL CODE § 261.6. Because California's statutory definition of consent requires "positive cooperation in an act" and because "[t]he person must act freely and voluntarily and *have knowledge* of the nature of the act or transaction involved," stealthing victims likely can argue that the perpetrator took off the condom during sex and the victim was unaware of this until afterwards. *Id.*

95. See Laura Kelly, *California Bill Seeks to Add 'Stealthing' to Rape Definition*, WASH. TIMES (May 17, 2017), <http://bit.ly/CaliforniaBillStealthing>.

96. The Model Penal Code is a model piece of legislation created by the American Law Institute—an organization comprised of distinguished jurists. See MARKUS D. DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE, at ix–x (2d ed. 2015). The Code "attempt[s] to present an accessible, comprehensive, and systematic account of American criminal law." *Id.* at ix.

of all of the circumstances, in determining whether there was consent. . .

(e) Consent may be revoked or withdrawn at any time before or during the act of sexual penetration or sexual contact. A clear verbal refusal—such as ‘No,’ ‘Stop,’ or ‘Don’t’—establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent.⁹⁷

While the MPC’s definition of consent does not recognize the affirmative consent standard used in California, the definition makes explicitly clear that consent can be revoked at any time.⁹⁸ Nonetheless, the MPC’s definition of consent is under-inclusive because whether courts in MPC jurisdictions will interpret the MPC’s definition of consent to include *protected* intercourse as a “specific act”⁹⁹ is uncertain.

3. Pennsylvania

Finally, Pennsylvania’s sexual assault statute does not define consent at all.¹⁰⁰ The statute states: “Except as provided by section 3121 (relating to rape) or 3123 (relating to involuntary deviate sexual intercourse), a person commits a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant’s consent.”¹⁰¹

Pennsylvania’s sexual assault statute does not define consent directly,¹⁰² but the state’s rape statute describes situations in which consent is lacking.¹⁰³ The statute indicates:

97. MODEL PENAL CODE § 213.0(3) (AM. LAW. INST. 2016).

98. *Id.*

99. *Id.*

100. See 18 PA. STAT. AND CONS. STAT. ANN. § 3124.1 (West, Westlaw through 2018 Reg. Sess. Act 76); see also 18 PA. STAT. AND CONS. STAT. ANN. § 3101 (West, Westlaw through 2018 Reg. Sess. Act 76) (containing definitions for “complainant,” “deviate sexual intercourse,” “forcible compulsion,” “foreign object,” “indecent contact,” “serious bodily injury,” and “sexual intercourse,” but *not* for “consent”).

101. 18 PA. STAT. AND CONS. STAT. ANN. § 3124.1 (West, Westlaw through 2018 Reg. Sess. Act 76).

102. Cf. *Commonwealth v. Rhodes*, 510 A.2d 1217, 1225 (Pa. 1986) (explaining the connection between the statutory definition of “ineffective consent” in Pennsylvania’s previous sexual assault statute and the phrase “forcible compulsion” in the Commonwealth’s rape statute).

103. See 18 PA. STAT. AND CONS. STAT. ANN. § 3121 (West, Westlaw through 2018 Reg. Sess. Act 76).

A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant:

- (1) By forcible compulsion.
- (2) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.
- (3) Who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring.
- (4) Where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance.
- (5) Who suffers from mental disability which renders the complainant incapable of consent.¹⁰⁴

Recognizing the need to define “forcible compulsion,” the Supreme Court of Pennsylvania declared that “‘forcible compulsion’ . . . includes not only physical force or violence but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person’s will.”¹⁰⁵ Following the Pennsylvania Supreme Court’s instruction in *Commonwealth v. Rhodes*,¹⁰⁶ Pennsylvania courts now administer a totality of the circumstances analysis to determine whether the evidence indicates that a sexual assault or rape survivor did not consent.¹⁰⁷

Pennsylvania courts are instructed to consider several factors, including “the respective ages of the victim and the accused,” their respective mental and physical conditions, the environment in which the

104. *Id.*

105. *Rhodes*, 510 A.2d at 1226. In *Rhodes*, the Supreme Court of Pennsylvania found there was sufficient evidence to prove beyond a reasonable doubt that the defendant had engaged in sexual intercourse with the victim by forcible compulsion where the defendant, a “twenty year old man who knew the child victim and her family for three years and who the victim knew as Nicky, lured the victim into an abandoned, filthy building and instructed her to lay down and pull her legs up,” and sexually assaulted her. *Id.* at 557.

106. *Commonwealth v. Rhodes*, 510 A.2d 1217 (Pa. 1986).

107. *See id.* at 1226. The Supreme Court of Pennsylvania instructed as follows: The determination of whether there is sufficient evidence to demonstrate beyond a reasonable doubt that an accused engaged in sexual intercourse by forcible compulsion . . . , or by the threat of such forcible compulsion that would prevent resistance by a person of reasonable resolution is, of course, a determination that will be made in each case based upon the totality of the circumstances that have been presented to the fact finder. *Id.*; *see also* *Commonwealth v. Gonzalez*, 109 A.3d 711, 721 (Pa. Super. Ct. 2015) (“A determination of forcible compulsion rests on the totality of the circumstances . . .”).

incident occurred, “the extent to which the accused may have been in a position of authority, domination or custodial control over the victim, and whether the victim was under duress.”¹⁰⁸ Although the list is not exhaustive,¹⁰⁹ a totality of the circumstances analysis indicating non-consent may not be enough to prove forcible compulsion.¹¹⁰ Even where a court finds a lack of consent, the “forcible compulsion” requirement is not met unless there is a “showing of either physical force, a threat of physical force, or a psychological coercion”¹¹¹ Considering Pennsylvania case law regarding consent thus begs the question: Would a Pennsylvania court find that removing a condom during otherwise consensual sex vitiates the original, freely given consent? Unfortunately, determining the answer with reasonable certainty is currently an impossible task.

E. Evidentiary Requirements in Sexual Assault Cases

In sexual assault cases, courts must employ a “beyond a reasonable doubt” standard to determine whether a defendant is guilty of committing the assault.¹¹² Although sexual assault statutes vary from state to state, whether the victim consented is the common question.¹¹³ How consent is proven, though, is often a difficult determination.¹¹⁴ Generally, in jurisdictions that do not employ affirmative consent, the prosecution must prove beyond a reasonable doubt that the victim actually refused the sexual act in order to establish that the defendant acted “without consent.”¹¹⁵

108. *Rhodes*, 510 A.2d at 1226.

109. *Id.*

110. *See Gonzalez*, 109 A.3d at 721.

111. *Id.*

112. *See In re Winship*, 397 U.S. 358, 361 (1990) (“The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.”). The objective of the “proof beyond a reasonable doubt” standard is to ensure that innocent persons are not falsely convicted of crimes and stripped of their liberties. *See Julie S. Chauvin, “For it Must Seem Their Guilty”: Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard*, 53 LOY. L. REV. 217, 221 (2007).

In 1970, the United States Supreme Court made this standard of proof a constitutional mandate. *See Winship*, 397 U.S. at 228. In *Winship*, the Supreme Court emphasized the importance of the proof beyond a reasonable doubt standard as upholding a criminal defendant’s due process rights. *Id.* at 363–64. For a discussion about the history of proof of guilt beyond a reasonable doubt, see generally Chauvin, *supra* note 112.

113. *See Dana Berliner, Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2689 (1991) (“Lack of consent is often believed to be an essential element of rape, because sexual activity with the consent of a woman is never rape.”).

114. *Id.*

115. *Id.*

Accordingly, “mere absence of consent or silence will usually be insufficient for conviction.”¹¹⁶

In other jurisdictions, courts will find that a victim did not “actually consent” where the prosecution can prove beyond a reasonable doubt that the victim lacked “knowledge of the nature of the act or transaction involved.”¹¹⁷ For example, in *People v. Morales*,¹¹⁸ a California court stated that a person unconscious of the act¹¹⁹—in this case, someone that is asleep—“necessarily does not act freely and voluntarily with knowledge of the nature of the act.”¹²⁰

Accordingly, a person gives “actual consent” when the person actually and freely gives consent without any misapprehension of material fact.¹²¹ In jurisdictions that find victims did not “actually consent” due to misapprehension of material fact, the prosecution must prove beyond a reasonable doubt that the victim actually and freely gave informed consent¹²² to the act that the victim and the perpetrator engaged in. In every jurisdiction though, the burden of proof is on the state to prove beyond a reasonable doubt that the survivor did not consent to the sexual acts.¹²³ Requiring the prosecution to meet this burden of proof in criminal cases, such as sexual assault incidents, satisfies the requirements of the Due Process Clause of the United States Constitution,¹²⁴ which ensures that no person is deprived of liberty without due process of law.

116. *Id.*

117. *People v. Giardino*, 82 Cal. App. 4th 454, 460 (2000).

118. *People v. Morales*, 212 Cal. Rptr. 3d 583, 586 (Cal. Ct. App. 2013).

119. California’s Penal Code defines “unconscious of the nature of the act” as:
[I]ncapable of resisting because the victim meets any one of the following conditions: (A) Was unconscious or asleep. (B) Was not aware, knowing, perceiving, or cognizant that the act occurred. (C) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator’s fraud in fact. (D) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator’s fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.

CAL. PENAL CODE § 261(a)(4) (West, Westlaw through Ch. 613 of 2018 Reg. Sess.).

120. *Morales*, 212 Cal. Rptr. 3d at 591.

121. *Id.*; see also 65 AM. JUR. 2D *Rape* § 5 (2018).

122. Informed consent means “[a]n agreement to do something or to allow something to happen, made with complete knowledge of all relevant facts, such as the risks involved or any available alternatives.” GERALD N. HILL & KATHLEEN T. HILL, NOLO’S PLAIN-ENGLISH LAW DICTIONARY 217 (2009). Here, therefore, informed consent means having knowledge of the circumstances surrounding the sexual act that will occur.

123. See *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (“Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.”).

124. See U.S. CONST. amend. XIV, § 1; see also *In re Winship*, 397 U.S. 358, 364 (1990).

F. Stealthing Should Be Classified as Sexual Assault Instead of Rape

Why should stealthing be classified as sexual assault instead of rape? After all, sexual activity without consent *is* rape. Curiously though, a common consensus among stealthing victims is that the experience does not justify the severe punishments associated with a rape conviction.¹²⁵ Instead, stealthing victims generally feel that their individual autonomy has been violated, and that their trust has been betrayed.¹²⁶ Survivors likely feel this way because they are not being forced to have sexual intercourse; instead, they have consented to the initial, protected sexual encounter.¹²⁷ A stealthing victim's paradigm shifts, however, when the victim did not want or intend to have direct contact with the perpetrator's genitals; instead of experiencing forced intercourse, the victim is experiencing "unwanted sexual conduct."¹²⁸ Because "unwanted sexual conduct" falls under the broad umbrella of sexual assault rather than the narrow definition of rape, so, too, should stealthing.¹²⁹

Stealthing, like other sexual offenses, is a dangerous sexual practice that undermines a survivor's bodily autonomy.¹³⁰ Whether perpetrators will be prosecuted under existing sexual assault or rape laws remains

125. See Jenavieve Hatch, *Victims of Stealthing Open Up About Why It's So Damaging*, HUFFINGTON POST (May 10, 2017, 4:32 PM), <http://bit.ly/2ABZAaC>. Many victim narratives end with "I consented to sex with him, so I didn't consider it rape, but I consented only to having sex with a condom." In the case of this quoted stealthing victim, she clarifies further, "I don't use the word rape lightly. I was brutally raped in my late 20s." *Id.*

126. *See id.*

127. *See id.*

128. See BOSKEY ET AL., *supra* note 87, at 4–5 (distinguishing between rape and sexual assault). Conduct amounts to sexual assault when it is "unwanted sexual conduct." *Id.* at 4. On the other hand, conduct amounts to rape when it is "forced sexual intercourse." *Id.* at 5.

129. Although it seems like a mere semantical difference, several jurisdictions treat sexual assault and rape differently. Compare MONT. CODE ANN. § 45-5-502(2)(a)-(c) (West, Westlaw through 2017 Leg. Sess.) (instructing that for the first sexual assault conviction, "the offender shall be fined an amount not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both[.]") with MONT. CODE ANN. § 45-5-503 (West, Westlaw through 2017 Leg. Sess.) (ordering that "[a] person convicted of sexual intercourse without consent shall be punished by life imprisonment or by imprisonment in the state prison for a term of not more than 20 years and may be fined not more than \$50,000 . . .").

Additionally, in states that make clear distinctions between forced penetration and involuntary or coerced touching, the former is often aggravated or first-degree sexual assault and the latter is often a lower-level sexual assault. Compare 18 PA. STAT. AND CONS. STAT. § 3124.1 (West, Westlaw through 2018 Reg. Sess. Act 76) (classifying sexual assault as a second-degree felony) with 18 PA. STAT. AND CONS. STAT. § 3121 (West, Westlaw 2018 Reg. Sess. Act 76) (classifying rape as a first-degree felony).

130. *See supra* Section II.C.2.

unclear due to the grey areas in definitions of consent.¹³¹ Ultimately, existing consent doctrines are insufficient to protect stealthing survivors.¹³² This insufficiency alone underscores the need for a new consent standard that will provide the requisite caliber of protection for a stealthing victim.¹³³ Enunciating and enforcing a better, more comprehensive standard for consent may lead to stronger protections for a broad range of sexual assault survivors.¹³⁴

As Margaret Sanger¹³⁵ once said, “no woman can call herself free who does not own and control her body.”¹³⁶ Reflecting on this idea suggests that United States courts, rather than United States lawmakers, have the unique responsibility of ensuring no woman is denied justice for the blatant violation of bodily autonomy that results from stealthing. Courts can satisfy this responsibility by adopting a conditional consent standard that could provide more protection than is available presently.

III. ANALYSIS

Dr. Carole Vance,¹³⁷ a visiting fellow at Yale Law School and an internationally-recognized anthropologist with various publications about sexuality, suggested that “a feminist approach to sexual matters must ‘simultaneously . . . reduce the dangers women face and . . . expand the possibilities, opportunities, and permissions for pleasure that are open to them.’”¹³⁸ To preserve sexual autonomy, then, the law must strike a balance between punishing dangerous sexual behavior and ensuring that

131. See *supra* Section II.D.

132. See *supra* Section II.D; see also *infra* Section III.A.2.

133. See *infra* Section III.B.

134. The proposed conditional consent standard has the potential to provide protections for other victims, such as male victims of “gift-giving.” See Weiss, *supra* note 27, at 389. Moreover, the proposed consent standard also may provide protections for victims of “tricked parenthood.” “Tricked parenthood” most often occurs when a woman promises her male partner that she is on birth control when she is not, and a child is born subsequently. See JUDITH C. AREEN ET AL., FAMILY LAW: CASES AND MATERIALS 712 (6th ed. 2012). In “tricked parenthood” situations, the tricked male partner is required to pay child support notwithstanding the woman’s trickery. *Id.*

135. Margaret Sanger is best remembered for her advocacy in the fight for birth control. To learn more about Margaret Sanger and her work as a sex educator, see generally JEAN H. BAKER, MARGARET SANGER: A LIFE OF PASSION (2011).

136. Margaret Sanger, *A Parents’ Problem or Woman’s?*, BIRTH CONTROL REV., Mar. 1919, at 6, 6, <http://bit.ly/TheBirthControlReview>.

137. To learn more about Dr. Carole S. Vance, see generally Carole Vance, YALE L. SCH., <https://law.yale.edu/carole-vance> (last visited Sept. 5, 2018).

138. Franke, *supra* note 71, at 181-82 (quoting Carole S. Vance, *More Danger, More Pleasure: A Decade After the Barnard Sexuality Conference*, 38 N.Y.U. L. REV. 289, 290 (1993)).

actual experience with pleasure is not made invisible.¹³⁹ Achieving this equilibrium is thus not possible unless attempts to prosecute stealthing recognize the need to avoid over-criminalizing sexual conduct.

Many stealthing survivors report feeling that, although the nonconsensual removal of the condom during sex violated their bodily and sexual autonomy, the act did not completely measure up to rape because the victim consented to sexual intercourse, and thus, the sexual intercourse itself was not forced.¹⁴⁰ Victims' perceptions of stealthing as a form of sexual assault and the need to avoid over-criminalizing sexual conduct both necessitate a determination that stealthing should be prosecuted under pre-existing sexual assault statutes. Under this authority, the question then becomes whether stealthing vitiates the victim's original consent to have protected sex.

Ultimately, legislators should refrain from creating new laws that classify stealthing as rape; instead, stealthing should be prosecuted under pre-existing sexual assault statutes to respect victims' wishes and impressions concerning the severity of their assault.¹⁴¹ Prosecuting stealthing under pre-existing sexual assault statutes also regards the notion that sexual conduct should not be over-criminalized.¹⁴² However, prosecuting stealthing under pre-existing sexual assault statutes will only work if United States courts adopt the conditional consent standard used by courts in the United Kingdom.¹⁴³ Under current sexual assault statutes, this conditional consent standard would ensure that stealthing perpetrators are held accountable for their actions and that stealthing survivors are vindicated through the criminal justice system.¹⁴⁴

A. *The Concept of Conditional Consent*

In the United Kingdom, the nonconsensual removal of a condom during sex likely vitiates a victim's original consent to protected sex.¹⁴⁵

139. See Vance, *supra* note 138, at 290 ("To encourage a mindless expansion of sexual options, without critiquing the sexist structure in which sexuality is enacted or reducing the dangers women face, only exposes women to more danger. . . . An exclusive focus on danger, however, is just as perilous.").

140. See *supra* note 125 and accompanying text.

141. See *supra* note 125 and accompanying text.

142. See *infra* Section II.C.

143. See *infra* Section III.B.

144. See *infra* Sections III.A.3, III.B.

145. See *Assange v. Swedish Prosecution Auth.* [2011] EWHC (Admin) 2849 [86] (Eng.) ("His conduct in having sexual intercourse without a condom in circumstances where she had made clear she would only have sexual intercourse if he used a condom would therefore amount to an offence."); see also *R. ex rel. F v. Dir. of Pub. Prosecutions*

Courts in the United Kingdom recognize a unique consent standard in sexual assault cases known as “conditional consent.”¹⁴⁶ In two significant cases, the United Kingdom’s High Court of Justice¹⁴⁷ determined that *true* consent exists only when the conditions upon which consent was given are complied with.¹⁴⁸ Recognizing this standard of consent in the United States would eliminate the loopholes contained within affirmative consent statutes, and would provide United States courts with instruction on how to deal with issues of consent where there is presently little or no guidance at all.

1. *Assange v. Swedish Prosecution Authority*

In *Assange v. Swedish Prosecution Authority*,¹⁴⁹ Julian Assange had sexual relations with a woman identified as AA.¹⁵⁰ A few days after the sexual relations occurred, AA went to the Swedish police to file a complaint against Assange.¹⁵¹ In a statement by AA, the survivor described what happened.¹⁵² AA explained that, from the outset, she made it clear to Assange that she wanted him to put on a condom before having sex.¹⁵³ In her statement, AA further indicated that she was concerned Assange had not put a condom on at all, so “she felt his penis with her hand to check he had really put it on.”¹⁵⁴ AA reported doing this multiple times during intercourse.¹⁵⁵ At one point, AA explained, Assange “had pulled his penis out of her and started to arrange the condom.”¹⁵⁶ After this

[2013] EWHC (Admin) 945 [26] (Eng.) (holding that a complainant was “deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based” where complainant originally “consented [to sexual intercourse] on the clear understanding that [her partner] would not ejaculate inside her vagina,” yet he deliberately did so nonetheless).

146. See *Assange*, [2011] EWHC (Admin) 2849 at [86]; *Dir. of Pub. Prosecutions*, [2013] (Admin) EWHC 945 at [26].

147. Similar to the United States court system, the United Kingdom has a hierarchy of courts, which begin with magistrate courts at the lowest level, the High Court of Justice at the next level, followed by the Court of Appeal, and the Supreme Court of the United Kingdom. For an in-depth explanation of the United Kingdom’s court system, see *The High Court*, IN BRIEF, <https://www.inbrief.co.uk/legal-system/high-court/> (last visited Sept. 5, 2018).

148. See *Assange*, [2011] EWHC (Admin) 2849 at [86]; see also *Dir. of Pub. Prosecutions*, [2013] (Admin) EWHC 945 at [26].

149. *Assange v. Swedish Prosecution Auth.* [2011] EWHC (Admin) 2849 (Eng.).

150. *Id.* at [1].

151. *Id.*

152. *Id.* at [93].

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

occurred, AA felt to make sure the condom was still there, and it was.¹⁵⁷ Later, however, AA discovered that Assange broke the condom and ejaculated inside of her vagina.¹⁵⁸

In its opinion, the High Court of the United Kingdom emphasized that “Assange knew that AA would only consent to sexual intercourse if he used a condom throughout, but he had concluded sexual intercourse with her without a condom.”¹⁵⁹ Assange argued that because “AA had consented to sexual intercourse, and [because] that was the nature of the relevant act, it did not matter that she had consented only on the basis that he used a condom, as that did not change the nature of the act.”¹⁶⁰

However, the court was not persuaded.¹⁶¹ Throughout its opinion, the court stressed that Assange had sexual intercourse with AA without a condom despite knowing AA had only agreed to sexual intercourse with a condom.¹⁶² The court concluded:

It would plainly be open to a jury to hold that if AA had made clear that she would only consent to sexual intercourse if [Assange] used a condom, then there would be no consent if, without her consent, he did not use a condom, or removed or tore the condom. His conduct in having sexual intercourse without a condom in circumstances where she had made clear she would only have sexual intercourse if he used a condom would therefore amount of an offen[s]e¹⁶³

As evidenced by the court’s finding, the High Court in *Assange* employed a “conditional consent” standard.¹⁶⁴ That is, “true consent” requires the conditions upon which consent was granted to be maintained throughout the sexual act.¹⁶⁵ In *Assange*, for example, AA made it clear—through her actions and her words—that she was consenting *only* to sex *with* a condom.¹⁶⁶ Therefore, by breaking his condom during intercourse, Assange violated the conditions of AA’s consent.¹⁶⁷ This same conditional

157. *Id.*

158. *Id.*

159. *Assange*, [2011] EWHC (Admin) 2849 at [79].

160. *Id.* at [84].

161. *See id.* at [86].

162. *Id.* at [86], [95], [124].

163. *Id.* at [86]. The court also emphasized the fact that this case did not deal with an allegation that the condom came off accidentally or was damaged accidentally; the allegation was that Assange deliberately damaged the condom without AA’s consent. *Id.* at [95].

164. *See id.* at [86].

165. *See id.*; *see also* R. ex rel. F v. Dir. of Pub. Prosecutions [2013] EWHC (Admin) 945 [26] (Eng.).

166. *Assange*, [2011] EWHC (Admin) 2849 at [86], [87].

167. *Id.* at [86], [93].

consent standard should be applied by United States courts in the context of stealthing to ensure survivors, like AA, receive justice for the undignified acts of the offender.

2. Conditional Consent versus Affirmative Consent

Affirmative consent rests on the idea that a partner must freely, voluntarily, and intelligently¹⁶⁸ agree to the nature of the sexual act.¹⁶⁹ Affirmative consent alone is insufficient to protect against stealthing. In a stealthing case, there is no doubt that the victim has agreed to *protected* intercourse with the perpetrator.¹⁷⁰ The paradigm shifts, however, when the conditions of that consent change—for example, when the condom is removed by the perpetrator.

Under current affirmative consent statutes, whether the victim's original consent is destroyed once the condom is removed is unclear because the nature of the act—sexual intercourse—has remained the same.¹⁷¹ In this instance, conditional consent makes up for the lapses in affirmative consent by adding an extra layer of protection for stealthing victims.¹⁷² Conditional consent would provide an answer to the question of whether consent is withdrawn once the condition is violated. Thus, the level of consent would no longer be affixed solely to the overall nature of the sexual activity, but instead to the material conditions upon which consent was given.

For example, where a victim agrees to protected sex, the protective condom is the condition, and sexual intercourse is the nature of the act. If a perpetrator purposely either damages, removes, or otherwise alters his condom during sex, the perpetrator has violated the condition upon which consent was based.¹⁷³ Thus, the condition's absence vitiates the original consent.¹⁷⁴ Under a conditional consent standard, if the perpetrator does not inform the partner about the fact that the condom has been either

168. Here, intelligently means “with knowledge of the nature of the act or transaction involved.” CAL. PENAL CODE § 261.6 (West, Westlaw through Ch. 228 of 2018 Legis. Sess.).

169. *See id.*

170. Just to be clear, if there is doubt about the *initial* consent, the case falls out of the purview of stealthing and into the purview of rape.

171. *See* CAL. PENAL CODE § 261.6 (West, Westlaw through Ch. 228 of 2018 Legis. Sess.); *see also supra* Section II.D.1.

172. Conditional consent could also potentially protect a male victim who conditions sex on a woman's word that she is taking birth control, but he later discovers she lied. *See supra* note 134.

173. *Assange v. Swedish Prosecution Auth.* [2011] EWHC (Admin) 2849 [86] (Eng.).

174. *See id.*

damaged, removed, or otherwise altered and fails to ask for new consent without the original condition, then the perpetrator has sexually assaulted the partner.¹⁷⁵

3. Conditional Consent and Due Process

While ensuring victims are being heard and vindicated for any sexual assault experiences is important, the Due Process Clause of the United States Constitution states “that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.”¹⁷⁶ Thus, under any version of consent, the prosecution must be able to prove beyond a reasonable doubt that the victim did not consent to the unwanted sexual conduct by the defendant.¹⁷⁷

Under a conditional consent standard, however, the prosecution will still bear the burden of proving the victim consented to *protected* sex, and that the defendant, at some point *during* sex, did not comply with the victim’s condition. Undisputedly, this standard raises serious questions about a victim’s re-victimization during criminal proceedings,¹⁷⁸ but the benefits presented by conditional consent far outweigh its costs.

First, conditional consent does not shift the burden from the prosecution to the defense; the prosecution still must prove beyond a reasonable doubt that the use of a condom was a condition to the victim’s original consent and that the defendant violated that condition. Keeping the evidentiary burden on the prosecution thus is in accordance with the Fourteenth Amendment’s Due Process Clause, which requires the prosecution to prove beyond a reasonable doubt that the defendant committed the crime in question.¹⁷⁹

175. *See id.*

176. U.S. CONST. amend. XIV, § 1; *see also* *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (“Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.”).

177. *See In re Winship*, 397 U.S. 358, 361 (1990) (“The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.”).

178. *See* Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67, 88 (2015) (“Through its processes and priorities, the current civilian criminal justice system maintains a community and culture, which abides re-victimization of sexual assault victims.”). Re-victimization is dangerous because the process can lead to “posttraumatic stress disorder; physical, mental, and sexual distress; and negative impacts on self-esteem and trust in the legal system.” *Id.* at 70.

179. *See Winship*, 397 U.S. at 361.

Moreover, a conditional consent standard would provide a more plausible framework for courts than is available today.¹⁸⁰ Some states rely on case law that applies a case-by-case analysis, while other states apply a statutory definition of consent.¹⁸¹ In each unique situation, however, a conditional consent standard would aid courts in answering the difficult questions: where does consent end, and where is new consent needed?

In *Assange*, for example, the court explained that AA checking to ensure the condom was still on Assange's genitals showed Assange did, in fact, have AA's consent to have sexual intercourse, but that AA's consent was conditioned on Assange using a condom during sex.¹⁸² Additionally, the court stated that, based off of AA's assertions and her conduct during intercourse, Assange could not have reasonably believed that he had AA's consent to penetrate her body with his bare genitals.¹⁸³ While the United Kingdom does not employ the "beyond a reasonable doubt" standard, the court's reasoning echoes the mechanisms used by courts in the United States.¹⁸⁴ Thus, while a conditional consent standard would carry an extremely high evidentiary burden, testimonial evidence could be used to prove conditional consent one way or the other, as was the case in *Assange*.¹⁸⁵

Testimonial evidence, however, might be difficult to obtain because stealthers may not be willing to openly admit their guilt.¹⁸⁶ Thus, conditional consent may not lead to many convictions. Nevertheless, a conditional consent standard will, at the very least, redefine societal expectations during sexual activity.¹⁸⁷ Often times laws serve an expressive function, whereby the law is used to impart ideas through words and symbols, which may serve both "to provide a voice in which citizens may speak . . . and alter the behavior of people the law

180. See *supra* Section II.D.

181. See *supra* Sections II.D.1, II.D.3.

182. *Assange v. Swedish Prosecution Auth.* [2011] EWHC (Admin) 2849 [95] (Eng.).

183. *Id.* at [90].

184. *Id.* at [95] ("The sole concern of this court is whether, on the basis that the fairness and accuracy of the description can be examined by reference to the materials in the prosecution file, the description of the conduct is fair and accurate."). But see *id.* at [95] (explaining that the High Court is a reviewing court and, therefore, "[w]hether there is sufficient evidence is a matter with which [the] court cannot be concerned.").

185. *Id.* at [74], [76], [93].

186. Cf. *id.* at [79] (suggesting that Assange admitted to removing his condom during sex only because he believed it was not illegal to do so once AA consented to sexual intercourse).

187. See Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498 (1992).

addresses.”¹⁸⁸ Here, a conditional consent standard may both reinforce the notion that women have agency over their body, and therefore, their ability to consent to specific sexual activities, and simultaneously deter men from stealthing their partners due to fear of imprisonment.¹⁸⁹

Ultimately, a conditional consent standard will provide courts with a more plausible framework that also complies with the Due Process Clause of the United States Constitution.¹⁹⁰ Additionally, because prosecution under a conditional consent standard may result in incarceration, the standard will also redefine societal expectations to demonstrate that sexual entitlement to women is *not* a right—a fact that current consent statutes do not convey clearly.

B. The Necessity of a New Standard for Consent

Currently, consent definitions do not extend past the boundaries of any particular state.¹⁹¹ Theoretically, a perpetrator that nonconsensually removes his condom during otherwise consensual sex could be held accountable in one state and not another.¹⁹² In some states, therefore, victims could potentially be vindicated, while in other states, and under the same set of facts, they might not be.¹⁹³

Moreover, current sexual assault laws are unclear about when, exactly, original consent is destroyed,¹⁹⁴ which may create difficulty for prosecutors attempting to bring charges against a perpetrator for stealthing his partner.¹⁹⁵ The ambiguity in sexual assault laws also poses difficulty to victims who are unsure whether their experience is classified as sexual assault, despite feeling extremely violated.¹⁹⁶ Stealthing survivors will be hesitant to come forward if there is no clear answer as to whether consent to sexual intercourse means consent to both protected and unprotected

188. *Id.*; see also ROBERT BELLAH ET AL., *THE GOOD SOCIETY* 10 (Knopf Doubleday ed. 2011) (noting that laws create and reinforce societal expectations by enforcing both positive and negative social sanctions).

189. *Cf.* BELLAH ET AL., *supra* note 188, at 10 (providing examples of societal expectations reinforced by social sanctions, which include a “handshake in a social situation, where the refusal to respond to an outstretched hand might cause embarrassment . . . [,] or . . . taxation upon which social services depend, where refusal to pay may be punished by fines and imprisonment”).

190. See *supra* Section III.A.3.

191. See *supra* Section II.D.

192. See *supra* Section II.D.

193. See *supra* Section II.D.

194. See *supra* Section II.D.

195. See *supra* Section III.A.2.

196. See *supra* Section II.F.

sexual intercourse.¹⁹⁷ Therefore, courts in the United States should employ a conditional consent standard to create consistency among the states, thereby allowing stealthing victims in all parts of the country to find the vindication they deserve.¹⁹⁸ Further, a uniform conditional consent standard would aid in clarifying obscurities among current consent definitions that cause immense confusion.¹⁹⁹

Undisputedly, consent theories are convoluted;²⁰⁰ some courts assert that lack of consent without evidence of forcible coercion is not enough,²⁰¹ while other courts say that affirmative consent must be given for every step of the sexual encounter.²⁰² What is missing in these theories, though, is an answer to a situation like stealthing: Person A gives consent, perhaps even affirmative consent, to a particular act with a specific condition to Person B, and Person B subsequently ignores or violates the condition without Person A's knowledge or consent. Accordingly, in order to ensure that every person has a voice and every crime has a consequence in the United States criminal justice system, United States courts should employ a conditional consent standard to create uniformity and rectify any ambiguity still plaguing sexual consent jurisprudence.

C. *We Need to Talk About Consent and Stealthing*

The sex-positive movement plays a vital role in breaking down rape culture and educating men and women of all ages about the contours of consent and the importance of honest communication.²⁰³ Thus, as a matter of public policy, discussing issues like stealthing is in the best interest of all people in the United States. Rape culture is not going to dismantle itself; only through courageous victim testimonies²⁰⁴ and honest conversations about sex will the United States be able to fight against a culture that undermines formal equality.²⁰⁵ Indeed, one scholar discussed

197. Cf. Brodsky, *supra* note 9, at 183 (explaining that victims of stealthing were hesitant to discuss their stealthing experience presumably because victims likely did not recognize they were victims until the practice had not been identified and named in early 2017).

198. See *supra* Section III.A.2.

199. See *supra* Section III.A.2.

200. See *supra* Section II.D.

201. See *supra* Section II.D.3.

202. See CAL. PENAL CODE § 261.6 (West 1994).

203. See *supra* Section II.C.2.

204. See, e.g., Raisman, *supra* note 3.

205. Formal equality theory emphasizes the notion that “individuals should be given as much liberty as possible.” BOWMAN ET AL., *supra* note 5, at 115. The theory emphasizes the need to avoid gender stereotypes. *Id.* Rape culture, however, reinforces gender

the importance of honest conversations regarding sexual experiences, and the importance of exploring what seemed like a sexual violation as opposed to sexual pleasure:

As part of the long-term struggle for understanding and transformation, we need to examine our own experiences of sexuality and the social and psychological dynamics of those experiences. The world is not divided neatly into good sex, on the one hand, and rape and violation on the other. . . . Women need to explore the full range of arguably sexual activities and their reactions to them. . . . [W]e must find a place for these conversations in which we can examine our understandings of the boundaries of pleasure and danger.²⁰⁶

Therefore, openly discussing stealthing increases the chances that people of any gender will be more educated about sex,²⁰⁷ thereby decreasing the likelihood that one partner will misunderstand another partner's non-consent to mean "yes," even when the partner utters or indicates "no."²⁰⁸ Discussing stealthing also facilitates the opportunity to create and provide realistic definitions and expectations regarding consent and sex, which is an important step to combating rape culture.²⁰⁹

Lastly, and most importantly, the mere fact that stealthing is an issue today exemplifies the urgent need for the United States to discuss that once conditions to consent—whether that be a condom, the use of a safe word, or the refusal to assume certain positions—are violated, the consent no longer exists. To solidify this ideal, courts in the United States should adopt a conditional consent standard not only to ensure stealthing victims have a legitimate case, but also to deliver a societal message that violating one's bodily autonomy is vehemently prohibited.²¹⁰

IV. CONCLUSION

Stealthing is a serious new sexual phenomenon rooting from an "ideology of male supremacy in which violence is a male's natural right."²¹¹ Stealthers revel in the idea that "sexual entitlement to women [is

stereotypes. See *supra* note 58 and accompanying text. Therefore, rape culture evidently undermines the formal equality theory.

206. Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 311-12 (1993).

207. See *supra* Section II.C.2.

208. See *supra* Section II.C.2.

209. See *Sex-Positivity: Educate, Empower, Self-Define!*, *supra* note 72.

210. See *supra* Section III.A.3.

211. Leclerc, *supra* note 27.

a] right.”²¹² This notion, though, could not be further from the truth. The sex-positive movement, which aims to destroy rape culture by emphasizing honest communication about sex and consent, stresses the need for women to have sexual autonomy.²¹³ Stealthing, however, undermines bodily autonomy.²¹⁴ Thus, in order to ensure bodily autonomy is preserved, United States courts should take reasonable steps to ensure stealthing is prosecuted and victims are vindicated.²¹⁵

Currently, no sexual assault statutes explicitly criminalize stealthing,²¹⁶ which leaves victims feeling confused about whether their experience constituted a sexual assault.²¹⁷ To clear up ambiguity and to be consistent with the feelings and desires of stealthing survivors, stealthing should be prosecuted under the larger umbrella of sexual assault rather than directly under rape laws.²¹⁸ In addition, avoiding the over-criminalization of sexual conduct is important to ensure real sexual experiences with pleasure are not negated.²¹⁹ Accordingly, lawmakers should refrain from creating new legislation that classifies stealthing as rape.²²⁰

Furthermore, United States courts should adopt a conditional consent standard to ensure that stealthing victims are vindicated rightfully by the criminal justice system.²²¹ A conditional consent standard would pick up the slack left by affirmative consent and other sexual assault laws by formalizing the belief that consent is no longer valid once the condition to consent is violated.²²² Furthermore, a conditional consent standard will alleviate ambiguity in sexual assault laws by providing a relatively clear-cut rule that both holds stealthers accountable and ensures an alleged perpetrator maintains his due process rights guaranteed by the Fourteenth Amendment.²²³

212. *Id.*

213. *See supra* Section II.C.2.

214. *See supra* Section II.C.2.

215. *See supra* Section III.C.

216. *See supra* Section II.D.

217. *See supra* Section II.C.1.

218. The author recognizes this is not a reality for all states; many states have one sexual assault statute, where rape is included in the actions that constitute a sexual assault. A conditional consent standard can nevertheless deter people from engaging in the nonconsensual removal of a condom or any other sexual act that is conditionally consented to. *See supra* Section III.A.3.

219. *See supra* Part III.

220. *See supra* Section II.F.

221. *See supra* Sections III.A.2, III.A.3, III.B.

222. *See supra* Sections III.A.2, III.B.

223. *See supra* Section III.A.3.

Although no one person or entity can dismantle rape culture alone, United States courts can play a vital role in progressing the momentum behind the sex-positive movement.²²⁴ By employing a conditional consent standard, United States courts can emphasize the need for open and honest communication about sexual expectations, which shakes at the roots of a culture deeply entrenched in trivializing sexual assault and normalizing male sexual violence.²²⁵

224. *See supra* Section III.B.

225. *See supra* Sections III.B, III.C.